PUBLIC PROSECUTOR

v.

RAJAPPAN CHINNA KOUNDER

HIGH COURT MALAYA, KUALA LUMPUR
NH CHAN J
[SELANGOR CRIMINAL APPLICATION NO. 3 OF 1984]
9 APRIL 1985

CRIMINAL LAW AND PROCEDURE: *Bigamy - Committed outside Malaysia - Jurisdiction of the Court - Provisions of Extradition Ordinance - Whether could be invoked - Provisions of ss. 5, 6, 7 of Law Reform (Marriage and Divorce) Act - Whether they extend to a person who contracts a second marriage outside Malaysia.*

The accused's marriage to his first wife was still subsisting when he married his second wife whilst on a visit in India. He subsequently returned to Malaysia with his second wife and was charged for bigamy under s. 494 of the Penal Code. The Magistrate refused to hear the case on the ground that she had no jurisdiction to try a case of bigamy which was committed outside Malaysia. The Public Prosecutor therefore applied to the High Court under s. 127(c) of the Criminal Procedure Code for a determination as to the Magistrate's jurisdiction to try the case.

Held:

[1] In Malaysia, in relation to the crime of bigamy, there does not seem to be a law which makes a person liable to be tried for bigamy committed outside Malaysia.

[2] Therefore, the provisions of the Extradition Ordinance 1958 which can only be invoked where the offence of bigamy was committed in Malaysia and the fugitive criminal is found in a foreign country which has an arrangement with Malaysia for mutual surrender of persons accused or convicted of crime have no relevance here.

[3] The provisions of ss. 5, 6 & 7 of the Law Reform (Marriage and Divorce) Act 1976 which invalidate a second marriage during the subsistence of a first marriage and make contravention of the provisions an offence, do not extend to a person who contracts a second marriage outside Malaysia.

[Appeal dismissed.]

Cases referred to:

Emperor v. Mt. Soni [1936] AIR (N) 13
R. v. Robinson [1938] 26 Cr App R 129
PP v. Nai Prasit [1961] MLJ 62
MacLeod v. Att.-Gen. for NSW [1891] AC 455
R. v. Hilaire [1903] 3 NSW State Rep 228
Jefferys v. Boosey 4 HLR 815
Pheroze v. State [1964] AIR Bom 264

Legislation referred to:

Criminal Code 1892 [Canada] ss. 275, 276
Criminal Law Amendment Act 1883, (New South Wales) s. 54
Criminal Procedure Code, ss. 4, 127(c), 188
Penal Code [Ind], ss. 3, 4
Law Reform (Marriage and Divorce) Act 1976, ss. 5(1), 6(1), 7
Penal Code, ss. 3, 4, 494
Offences Against the Person Act 1861 [UK], s. 57

Other sources referred to:
Law of Crimes, Ratanlal, (1982) (Reprint) 1281
AIR Commentaries on the Indian Penal Code, 2nd Edn., Vol. 1, p. 141
Penal law of India, Gour's, 10th Edn., Vol. 1, p. 155

For the applicant/public prosecutor - Tan Hock Chuan
For the respondent - M. Satchiananda; M/s. Satchi & Co.

JUDGMENT

NH Chan J:

Rajappan s/o Chinna Kounder married Palaniyammal d/o Nalli Kounder in India in 1947. In 1954, they left India with their children to come to live in this Country. In March 1984, Rajappan visited India. While he was there, he married Saraswathy. On 31 May 1984, he returned to Malaysia with his new bride. His first wife Palaniyammal is still living and their marriage is still subsisting.

On 18 August 1984, Rajappan was charged in the Magistrate Court at Klang for bigamy under s. 494 of the Penal Code. The magistrate refused to hear the case on the ground that she has no jurisdiction to try a case of bigamy which was committed outside Malaysia. The Public Prosecutor now applies to this Court under s. 127(c) of the Criminal Procedure Code for a determination on whether a Magistrate's Court has jurisdiction to try the offence.

Where a person, having a wife (husband) living, marries another woman (man) so that the second marriage would have been void because the spouse in the earlier marriage is still living, he (she) has committed the offence of bigamy under s. 494 of the Penal Code.

It is necessary for the prosecution to prove the subsequent marriage. The prosecution must prove that the accused went through a form of marriage with another person. Ratanlal on Crimes points out that the section punishes the offence known to English law as bigamy. It makes the offence of bigamy punishable where the person having a spouse living, marries another in any case in which such remarriage would be void by reason of its taking place during the life of such spouse.

The word "marry" implies going through a form of marriage whether the same is in fact valid or not: Ratanlal, *Law of Crimes* (1982) (Reprint) 1281; *Emperor v. Mt. Soni* [1936] AIR (N) 13; see also *R. v. Robinson* [1938] 26 Cr App R 129. Therefore the word "marry" means going through a ceremony of marriage. The ceremony of a second marriage or remarriage constitutes the offence of bigamy.

But is it an offence if the second marriage takes place outside Malaysia?

In *PP v. Nai Prasit* [1961] MLJ 62, Thomson CJ held that the Sessions Court had no jurisdiction to try the offence of bigamy committed outside the Federation. This is what he said:

> The accused in this case was convicted in the Sessions Court at Kuala Lumpur for bigamy in contravention of s. 494 of the Penal Code.
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> The actual act of bigamy, that is to say, the second marriage which was alleged to be void by reason of the wife of the first marriage being still alive, took place in the State of Victoria in the Commonwealth of Australia. In the circumstances the Sessions Court had no jurisdiction to try the case ... the Court has no jurisdiction to try any offence committed outside the Federation.

In the present case, therefore, the proceedings were a nullity and the conviction of the accused is accordingly set aside.

In *MacLeod v. Att.-Gen. for NSW* [1891] AC 455 it was held by the Privy Council that there was no jurisdiction in the Colony of New South Wales to try the appellant for the offence of bigamy alleged to have been committed in the United States of America. In that case, the appellant married Mary Manson on 13 July 1872 at Darling Point in the Colony of New South Wales. And in her lifetime on 8 May 1889 he married at St. Louis, in the State of Missouri in the United States of America, Elizabeth Cameron. He was convicted for the offence of bigamy under s. 54 of the Criminal Law Amendment Act 1883. On appeal to the Privy Council, this is what Lord Halsbury LC said, at pp. 456, 457:

> That section, so far as it is material to this case, is in these words: 'Whosoever being married marries another person during the life of the former husband or wife, wheresoever such second marriage takes place, shall be liable to penal servitude for seven years.' In the first place, it is necessary to construe the word 'whosoever'; and in its proper meaning it comprehends all persons all over the world, natives of whatever country. The next word which has to be construed is 'wheresoever.' There is no limit of person, according to one construction of 'whosoever'; and the word 'wheresoever' is equally universal in its application. Therefore, if their Lordship construe the statute as it stands, and upon the bare words, any person, married to any other person, who marries a second time anywhere in the habitable globe, is amenable to the criminal jurisdiction of New South Wales, if he can be caught in that Colony. That seems to their Lordships to be an impossible construction of the statute; the Colony can have no such jurisdiction, and their Lordships do not desire to attribute to the Colonial Legislature an effort to enlarge their jurisdiction to such an extent as would be inconsistent with the powers committed to a colony, and, indeed, inconsistent with the most familiar principles of international law. It therefore becomes necessary to search for limitations, to see what would be the reasonable limitation to apply to words so general; and their Lordships take it that the words 'Whosoever being married' mean, 'Whosoever being married, and who is amenable, at the time of the offence committed, to the jurisdiction of the Colony of New South Wales'.
>
> 'Wheresoever', therefore, may be read, 'Wheresoever in this Colony the offence is committed.'

MacLeod v. Att.-Gen. for NSW was applied in *R. v. Hilaire* [1903] 3 NSW State Rep 228. Owen J in that case said, at p. 230:

> I am of opinion that the Supreme Court has no jurisdiction to deal with this case. The crime was committed in New Zealand, and the question is whether this Court has power to try a person for the crime of bigamy committed outside the limits of the State.
>
> In *MacLeod v. Attorney-General* [1891] AC 455; 12 NSWLR 232 it was held by the Privy Council that this Court had no jurisdiction to deal with crimes committed outside the limits of New South Wales.

He concluded by saying at p. 231:

> ... what the Privy Council decided is quite clear, and that is that this Court has no jurisdiction to deal with the offence of bigamy in cases where the second marriage takes place outside New South Wales.

This was followed by G.B. Simpson J who said, at p. 231:

> I am of opinion that the Courts of this State have no jurisdiction to try cases of bigamy where the second marriage has taken place outside the State.

And Pring J concurred.

It follows from the two cases; *MacLeod v. Att.-Gen. for NSW* and *R. v. Hilaire,* that the judgment of Thomson CJ in *PP v. Nai Prasit* can be supported by high authority. The alternative would mean that s. 494 of the Penal Code, standing alone, would have the effect of bringing "all persons all over the world, natives of whatever country" within the ambit of the section, the same way s. 54 of the Criminal Law Amendment Act 1883 might have in the Colony of New South Wales but for the Privy Council decision in *MacLeod v. Att.-Gen. for NSW*. It would have meant that all persons anywhere in the world would become amenable to the criminal jurisdiction of this country. As was said by Lord Halsbury LC in *MacLeod v. Att.-Gen.,* that seems to be an impossible construction of the statute. Section 494 of the Penal Code reads:

> 494. **Whoever,** having a husband or wife living, marries in any case in which such marriage is void by reason of its taking place during the life of such husband or wife, shall be punished with imprisonment for a term which may extend to seven years, and shall also be liable to fine.
>
> [Emphasis Added]

Lord Wensleydale, when Baron Parke, advising the House of Lords in *Jefferys v. Boosey* 4 HLR 815, 926, expressed the proposition in this way:

> The Legislature has no power over any persons except its own subjects - that is, persons natural-born subjects, or residents, or whilst they are within the limits of the kingdom. The Legislature can impose no duties except on them; and when legislating for the benefit of persons, must *prima facie,* be considered to mean the benefit of those who owe obedience to our laws, and whose interests the legislature is under a correlative obligation to protect.

Lord Halsbury LC, after approving that passage, said in *MacLeod v. Att.-Gen.,* at pp. 458-459:

> All crime is local. The jurisdiction over the crime belongs to the country where the crime is committed, and, except over her own subjects, Her Majesty and the Imperial Legislature have no power whatever. It appears to their Lordships that the effect of giving the wider interpretation to this statute necessary to sustain this indictment would be to comprehend a great deal more than Her Majesty's subjects; more than any persons who may be within the jurisdiction of the Colony by any means whatsoever; ... Their Lordships are far from suggesting that the Legislature of the Colony did mean to give to themselves so wide a jurisdiction. The more reasonable theory to adopt is that the language was used, subject to the well-known and well-considered limitation, that they were only legislating for those who were actually within their jurisdiction, and within the limits of the Colony.

Therefore, s. 494, standing by itself, should have a restricted interpretation. *PP v. Nai Prasit* was correctly decided. It has the support of *MacLeod v. Att.-Gen. for NSW*. Thomson CJ was quite right when he held that the Court had no jurisdiction to try a person for the crime of bigamy where the second marriage took place outside Malaya.

At this point, it is convenient to return to the words of Lord Wensleydale: the legislature has no power over any persons except its own citizens and those who owe local allegiance to the country, such as, residents or those who may be within the country. Or as put by Lord Halsbury LC, all crime is local and the jurisdiction over the crime belongs to the country where the crime is committed; outside the country the government has no power whatever except over its own citizens. This is because every state admittedly has a right to impose duties upon its citizens in a foreign country; see *Re Bigamy Sections of Code [1897] 27 SCR 461,* where King J said, at p. 485:

> As to the propositions that crime is local, and that the jurisdiction over the crime belongs to the country where the crime is committed, these are not intended to be absolute and exclusive, as every state admittedly has a right to impose duties upon its own subjects in a foreign country.

The Privy Council in *MacLeod v. Att-Gen.* thought that the word 'whosoever' has too wide a meaning, as in its ordinary meaning it embraces all persons all over the world; citizens as well as foreigners. Their Lordships felt that it was necessary "to search for limitations, to see what would be the reasonable limitation to apply to words so general; and their Lordships take it that the words 'Whosoever being married' mean, 'Whosoever being married, and who is amenable, at the time of the offence committed, to the jurisdiction of the Colony of New South Wales.'"

In the United Kingdom, in the case of s. 57 of the Offences Against the Person Act 1861 which deals with bigamy, there is no difficulty about the meaning of the word 'whosoever' in the section because the proviso to the section has restricted the application of the section by saying that the offence of bigamy shall not extend to any second marriage contracted outside the United Kingdom by anyone other than a subject of Her Majesty. In other words, a British subject can commit bigamy by contracting a second marriage outside the United Kingdom but a foreigner will not. Section 57 reads:

> 57. Whosoever, being married, shall marry any other person, during the life of the former husband or wife, whether the second marriage shall have taken place in England or Ireland or elsewhere, shall be guilty of an offence and being convicted thereof shall be liable to be imprisoned for any term not exceeding seven years ...

In *Re Bigamy Sections of Code* [1897] 27 SCR 461, the Supreme Court of Canada was asked to determine whether the Parliament of Canada had authority to enact ss. 275 and 276 of the Canadian Criminal Code 1892. The relevant part of s. 275 reads:

> 275 (1). Bigamy is -
>
> (a) The act of a person who, being married, goes through a form of marriage with any other person in any part of the world;
>
> ...
>
> (4) No person shall be liable to be convicted of bigamy in respect of having gone through a form of marriage in a place not in Canada, unless such a person, being a British subject resident in Canada, leaves Canada with intent to go through such form of marriage.

Section 276 deals with the punishment for bigamy. The Supreme Court answered the question in the affirmative. This is what Girouard J said, at pp. 486, 487:

> It seems to me that *MacLeod v. Attorney General for New South Wales*, is distinguishable from the one contemplated in the Canadian Code. Article 275 of the Code, para. 4, says:
>
> > No person shall be liable to be convicted of bigamy in respect of having gone through a form of marriage in a place not in Canada, unless such a person, being a British subject resident in Canada, leaves Canada with intent to go through such form of marriage.
>
> So far as I can gather from the quotation of the New South Wales statute made by the judicial committee, that statute does not contain any such qualification. Section 54 enacts that:
>
> > **Whosoever** being married, marries another person during the life of the former husband or wife, **wheresoever** such second marriage take place, shall be liable to penal servitude for seven years.

Their Lordships remarked that:

> If they construe that statute as it stands, and upon the bare words, any person married to any other person, who marries a second time anywhere in the habitable globe, is amenable to the criminal jurisdiction of New South Wales, if he can be caught in that colony. That seems to their Lordships to be an impossible construction of the statute; the colony can have no such jurisdiction.
>
> The decision of the judicial committee appears to have turned upon the construction of the words 'whosoever' and wheresoever'. **Wheresoever** said their Lordships, 'therefore may be read, wheresoever **in this colony** the offence is committed.'

He then concluded, at p. 488, that:

> The Canadian statute applies only to a British subject resident in Canada and leaving Canada **with intent to go through such form of marriage.**

In India, there is s. 3 of the Indian Penal Code:

> 3. Any person liable, by any Indian law, to be tried for an offence committed beyond India shall be dealt with according to the provisions of this Code for any act committed beyond India in the same manner as if such act had been committed within India.

The section postulates that, before a person committing an offence beyond the limits of India can be dealt with under the provisions of the Indian Penal Code, there must be an Indian law which provides for the trial of such person in India: *AIR Commentaries on the Indian Penal Code* 2nd Edn., Vol. 1, p. 141. Put in another way, s. 3 of the Indian Penal Code provides for the extra-territorial operation of the Code to any person liable by Indian law to be tried for an offence committed beyond India, in the same manner as if it had been committed within India: see Gour's *Penal Law of India*, 10th Edn., Vol. 1, p. 155.

The Indian law which makes a person liable to be tried for an offence committed beyond India is s. 4 of the Indian Penal Code which provides for the extension of the Code to extra-territorial offences. Section 4 confines itself to offences committed (1) by any citizen of India in any place without and beyond India and (2) by any person on any ship or aircraft registered in India wherever it may be. Its procedural counterpart is s. 188 of the Indian Code of Criminal Procedure.

In *Pheroze v. State* [1964] AIR Bom 264, Naik J, after referring to ss. 3 and 4, Indian Penal Code, put it thus (p. 266):

> There is one illustration [in s. 4 of the Indian Penal Code], which is as follows:
>
> > A who is a citizen of India commits a murder in Uganda. He can be tried and convicted of murder in any place in India in which he may be found.
>
> It will thus be seen that so far as an Indian Citizen is concerned he should be deemed to have committed an offence in India, even if he has committed the offence outside the limits of Indian territory and even if the act complained of does not constitute an offence under the law prevailing in the place in which the offence was committed. The illustration relates to the place of trial and in effect says:
>
> > He can be tried and convicted of murder in any place in India in which he may be found.
>
> Since the offence had been committed beyond the limits of Indian territory, it is obvious that none of the provisions of the Code of Criminal Procedure relating to the place of trial would be attracted to such a case and, therefore, a rule had to be laid down as a matter of

convenience providing that the offender would be tried in the place where he is found. This provision must be read in conjunction with the provisions of s. 188, Cr. PC, which runs thus:

> When an offence is committed by -
>
> (a) any citizen of India in any place without and beyond India;
>
> (b) xxx xxx xxx
>
> he may be dealt with in respect of such offence as if it had been committed at any place within India at which he may be found.

The provisions of s. 4, IPC and s. 188, Cr. PC are complementary to one another. What is stated in the form of illustration is s. 4, IPC has been provided for in the body of the statute in s. 188, Cr. PC

In this country, we also have s. 3 of the Penal Code. As for s. 4, unlike the Indian counterpart which extends to the whole Code, our section only extends to the offences found in Chapter VI of our Penal Code. We do not have the equivalent of s. 188 of the Indian Code of Criminal Procedure. The offence of bigamy under s. 494 is not to be found in Chapter VI. It is in Chapter XX of the Penal Code. Therefore, in Malaysia, in relation to the crime of bigamy, there does not seem to be a law which makes a person liable to be tried for bigamy committed outside Malaysia.

But then, what about the Extradition Ordinance 1958 since bigamy is an extraditable crime? That may be true, but the crime of bigamy as it stands today, according to *PP v. Nai Prasit*, is an offence which does not extend to a second marriage contracted outside the country. The extradition provisions can only be invoked where the offence of bigamy was committed in this country and the fugitive criminal is found in a foreign country which has an arrangement with our country for the mutual surrender of persons accused or convicted of crime.

What about s. 7 read with s. 5(1) of the Law Reform (Marriage and Divorce) Act 1976? Would those provisions be the law indicated in s. 3 of the Penal Code which makes a person liable to be tried here in Malaysia for bigamy committed beyond the limits of Malaysia? I do not think so. Section 5(1) of the Law Reform Act says that "every person" who is lawfully married shall be incapable during the subsistence of such marriage of contracting a valid marriage with another person. A marriage contracted in contravention of s. 5 shall be void; s. 6(1). And s. 7 says that "any person" who during the continuance of the first marriage contracts another marriage in contravention of s. 5 shall be deemed to commit the offence of marrying again during the lifetime of a husband or wife, as the case may, within the meaning of s. 494 of the Penal Code. The words "every person" in s. 5(1) and "any person" in s. 7 mean the same thing as the word "whosoever" in *MacLeod v. Att-Gen. for NSW* and "whoever" in s. 494 of our Penal Code. Those words in their ordinary meaning would embrace all persons all over the world; citizens as well as foreigners. As was said by Lord Halsbury LC that seems to be an impossible construction of the statute. All crime is local and the jurisdiction over the crime belongs to the country where the crime is committed; outside the limits of the country the legislature has no power whatever except over its own citizens. In my opinion, applying the reasoning of *MacLeod v. Att.-Gen. for NSW* and following *PP v. Nai Prasit*, the words "every person" and "any person" in ss. 5(1) and 7 of the Law Reform (Marriage and Divorce) Act do not extend to a person who contracts a second marriage outside Malaysia. The Law Reform Act is not the law which provides for the trial of a person in this

country for the crime of bigamy committed beyond the limits of Malaysia. As I have said earlier, in relation to bigamy, there does not seem to be any law in Malaysia which makes a person liable to be tried for the crime of bigamy committed outside Malaysia.

Until the law is changed; unless s. 4 of the Penal Code is extended to cover all the offences in the whole Code or at least Chapter XX, *PP v. Nai Prasit* is still good law. Another way is to add a proviso to s. 494 along the lines of the proviso to s. 57 of the United Kingdom Offences Against the Person Act. As the law stands at the present time, bigamy is not an offence in this country if the second marriage takes place outside Malaysia even though the spouse in the earlier marriage is still living. Until there has been a change in the law, the Courts in this country do not have jurisdiction to try offences committed outside the limits of Malaysia except those offences found in Chapter VI of the Penal Code.

Also found at [1985] 2 CLJ 259